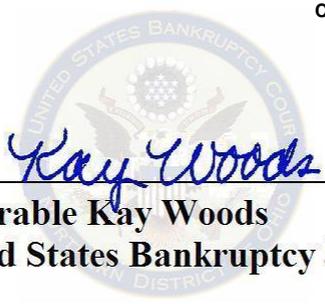


IT IS SO ORDERED.



Dated: January 04, 2008
10:28:21 AM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

3710 HENDRICKS ROAD CORP.,
fka YSD INDUSTRIES, INC.

Debtor.

CASE NUMBER 05-43771

THE LAMSON & SESSIONS COMPANY,
and
RICHARD G. ZELLERS, TRUSTEE,

Plaintiffs,

ADVERSARY NUMBER 05-4131

vs.

MUNDINGER TRUST, et al.,

Defendants

CHAPTER 7

HONORABLE KAY WOODS

ORDER DETERMINING RIGHT TO JURY TRIAL
Not Intended for National Publication

The following Order is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than www.ohnbuscourts.gov is not the result of direct submission by

this Court. The opinion is available through electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

For the reasons set forth below, this Court finds that: (i) this Court has jurisdiction over this proceeding, and (ii) Defendants William D. Munding ("Munding"), William H. Peters ("Peters"), William D. Munding Trust ("Munding Trust"), William H. Peters Revocable Trust ("Peters Trust"), Stanley W. Cosky ("Cosky"), Karen A. Munding ("Mrs. Munding"), Karen A. Munding Revocable Trust ("Mrs. Munding Trust"), Deanna V. Peters ("Mrs. Peters"), Deanna V. Peters Revocable Trust ("Mrs. Peters Trust"), Packer Thomas and Company ("Packer Thomas"), Phil Dennison ("Dennison"), and James L. Messenger ("Messenger") (collectively, "Defendants") have a right to a jury trial in this adversary proceeding.

I. FACTUAL AND PROCEDURAL BACKGROUND

YSD Industries ("YSD" or "Debtor") filed a chapter 7 voluntary petition on June 26, 2005. That same day, Debtor filed Notice of Removal of State Court Civil Action to Bankruptcy Court (Doc. # 1). The State Court Action, brought by The Lamson & Sessions Co. ("Lamson") in July 2004 against Debtor, Munding, and Peters, sets forth six counts: (i) breach of contract against Debtor, (ii) breach of contract against Munding and Peters, (iii) fraudulent transfer in violation of Ohio Revised Code ("O.R.C.") § 1336.04, (iv) fraudulent transfer in violation of O.R.C. § 1336.05, (v) breach of fiduciary duty, and (vi) unjust enrichment. Munding and Peters were directors of YSD and were YSD's sole shareholders. In seeking to remove the State Court Action, Debtor argued that all of the State Court Action "claims

and causes of action . . . are core proceedings under 28 U.S.C. § 157(b)(2)(F)(H)&(O)."

In addition to the facts listed below, this Order incorporates by reference the facts detailed by this Court in Memorandum Opinion Denying Motion to Dismiss, entered on October 5, 2005, in the main case from which this Adversary Proceeding has arisen. (Case # 05-43771, Doc. # 62).

On July 5, 2005, Lamson filed with this Court a copy of the State Court Action Amended Complaint (Doc. # 13), which sets forth the same six counts enumerated in the State Court Action. Debtor filed Answer of Defendant YSD Industries, Inc. - Jury Demand Endorsed Hereon (Doc. # 12), which contained a demand for trial by jury.

On August 11, 2005, Chapter 7 Trustee Richard Zellers ("Trustee") filed Trustee's Amended Motion for Order Substituting Trustee as Plaintiff ("Substitution Motion"¹) (Doc. # 25) with respect to Counts II, III, IV, V, and VI of the Amended Complaint. Subsequent to the October 19, 2005, hearing on this issue, this Court issued Memorandum Opinion Granting in Part [as to Counts III, IV, and V] and Denying in Part [as to Counts II and VI] Trustee's Amended Motion for Order Substituting Trustee as Plaintiff ("Substitution Order") (Doc. # 33).²

¹This definition incorporates both the Trustee's Amended Motion for Order Substituting Trustee as Plaintiff (Doc. # 19), filed by Trustee on July 5, 2005, and Trustee's Amended Motion for Order Substituting Trustee as Plaintiff (Doc. # 25), filed by Trustee on August 11, 2005.

²Mundinger and Peters filed a Notice of Appeal of the Substitution Order. The Sixth Circuit Bankruptcy Appellate Panel dismissed the appeal for lack of jurisdiction on January 13, 2006 (Doc. # 52).

Trustee filed Amended Complaint (Doc. # 48) against Debtor, Mundinger, and Peters on November 30, 2005. Trustee noted "this adversary proceeding constitutes a core proceeding pursuant to 28 U.S.C. Section 157(b)(2)(O)."³ (Doc. # 48, ¶ 7). Mundinger and Peters filed Separate Answer of Defendants William Mundinger and William Peters (Doc. # 54) on January 26, 2006, which (i) admitted the truth of Paragraph 7 of the Amended Complaint and (ii) contained a jury demand.

Lamson filed Second Amended Complaint of Plaintiff The Lamson & Sessions Co. (Doc. # 63) on May 5, 2006, against Mundinger and Peters, who filed Separate Answer of Defendants William Mundinger and William Peters (Doc. # 66) on May 24, 2006.⁴

Trustee and Lamson (collectively "Plaintiffs") filed Third Amended Complaint (Doc. # 87) against all Defendants, except Messenger, on November 8, 2006. The Third Amended Complaint contained ten counts. The named Defendants filed six separate Answers to Plaintiffs' Third Amended Complaint on December 14, 2006 (Doc. # 100-105).⁵

³ Plaintiffs included this averment in each subsequent Amended Complaint (Doc. # 63, ¶ 6; Doc. # 87, ¶ 16; Doc. # 129, ¶ 17).

⁴Mundinger and Peters admitted the averment in Plaintiff's Second Amended Complaint (Doc. # 63, ¶ 6) that this is a core proceeding. (Doc. # 66, ¶ 6).

⁵Answer of Packer Thomas and Phil Dennison to Plaintiffs' Third Amended Complaint states: "Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations [that this is a core proceeding] contained in paragraph 16 of the third amended complaint." (Doc. # 100, ¶ 16). The other five answers each assert: "Defendants are without personal knowledge of the averments set forth in [Paragraph 16] of the Third Amended Complaint and for the purpose of requiring strict proof thereof, deny such averments." (Doc. # 101, ¶ 2; Doc. # 102, ¶ 2; Doc. # 103, ¶ 2; Doc. # 104, ¶ 2; Doc. 105, ¶ 2).

Plaintiffs filed Fourth Amended Complaint ("Complaint") against all Defendants on June 21, 2007 (Doc. # 129). This Complaint, the final complaint to date, contains ten counts:

1. Lamson's breach of contract claim against Munding and Peters based on alter ego ("Count I");
2. Trustee's claim for fraudulent transfer (O.R.C. § 1336.04) against Munding, Peters, Cosky, Munding Trust, Mrs. Munding, Mrs. Munding Trust, Peters Trust, Mrs. Peters, and Mrs. Peters Trust ("Count II");
3. Trustee's claim for fraudulent transfer (O.R.C. § 1336.05) against YSD, Munding, Peters, Cosky, Munding Trust, Mrs. Munding, Mrs. Munding Trust, Peters Trust, Mrs. Peters, and Mrs. Peters Trust ("Count III");
4. Trustee's claim for breach of fiduciary duty against Munding, Peters, and Messenger ("Count IV");
5. Lamson's unjust enrichment claim against Munding and Peters ("Count V");
6. Trustee's claim for unjust enrichment against Munding and Peters ("Count VI");
7. Trustee's claim for unlawful dividends against Munding, Messenger, and Peters ("Count VII");
8. Lamson's claim for intentional interference with contract against Munding, Peters, Dennison, and Packer Thomas ("Count VIII");
9. Trustee's claim for professional negligence against Dennison and Packer Thomas ("Count IX"); and
10. Trustee's claim for aiding and abetting fraudulent transfers against Dennison, Messenger, and Packer Thomas.

Seven separate answers were filed by Defendants; each answer included a jury demand. Packer Thomas and Dennison jointly filed Answer of Packer Thomas and Phil Dennison to Plaintiffs' Fourth Amended Complaint (Jury Demand Endorsed Hereon) on July 31, 2007 (Doc. # 138). On August 1, 2007, Munding filed Separate Answer of William D. Munding as Officer and Director of YSD Industries, Inc. and Individually and William D. Munding Trust as Shareholder U/A 10/13/99 and William D. Munding Trustee to Fourth Amended Complaint (Doc. #142); Peters filed Separate Answer of William H. Peters as Officer and Director of YSD Industries, Inc. and Individually and William H. Peters Revocable Trust as Shareholder U/A 04/15/02 and William H. Peters Trustee to Fourth Amended Complaint (Doc. # 144); Mrs. Munding filed Separate Answer of Karen A. Munding Revocable Trust, and Karen A. Munding, Trustee to Fourth Amended Complaint (Doc. # 140); Mrs. Peters filed Separate Answer of Deanna V. Peters Revocable Trust, and Deanna V. Peters, Trustee to Fourth Amended Complaint (Doc. # 141); and Cosky filed Separate Answer of Stanley W. Cosky as Officer, Individual and Transferee to Fourth Amended Complaint (Doc. # 143). Messenger filed Separate Answer of James L. Messenger, as Director - Jury Demand Endorsed Hereon ("Messenger's Answer") (Doc. # 150) on July 7, 2007.⁶

This Court issued Adversary Case Management Order ("Case

⁶With the exception of Messenger's Answer, each of the other Answers contains the same admission or denial included in the Answers to the Third Amended Complaint, discussed in n.5 *supra*. Messenger's Answer fails to address Plaintiffs' averment that this is a core proceeding. According to FED. R. CIV. P. 8(d), "[a]lverments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading."

Management Order") (Doc. # 146) on August 2, 2007. Defendants filed two subsequent Motions to Withdraw the Reference: (i) Motion to Withdraw Reference Regarding Adversary Proceedings of Defendants William D. Munding Trust U/A 10/13/99, William D. Munding, William H. Peters Revocable Trust U/A 4/15/02, William H. Peters, Stanley W. Cosky, Karen A. Munding Revocable Trust, Karen A. Munding, Deanna V. Peters Revocable Trust, Deanna V. Peters and James L. Messenger (Doc. # 153) on August 16, 2007, and (ii) Motion of Packer Thomas and Phil Dennison to Withdraw Order of Reference (Doc. # 154) on August 17, 2007. Both Motions were denied by United States District Court Judge Christopher A. Boyko on September 27, 2007 (Doc. # 167).

II. DETERMINATION OF RIGHT TO JURY TRIAL

Section 8 of the Case Management Order states that "[i]n any adversary proceeding where a jury demand is made, the Court will make an initial determination as to whether the case constitutes a core proceeding and whether there is a basis for the Court to conclude that the right to a jury trial does or may exist." (Case Management Order at 8).

A. Core Proceedings

This Court has subject matter jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 157.⁷ "Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case

⁷Pursuant to General Order 84, dated July 16, 1984, the United States District Court Judges for the Northern District of Ohio referred all such cases to the Bankruptcy Judges of this district.

under title 11, referred [by the district court], and may enter appropriate orders and judgments" 28 U.S.C. § 157(b)(1) (West 2007). See also *Binder v. Price Waterhouse & Co., LLP (In re Resorts Int'l, Inc.)*, 372 F.3d 154, 162 (3rd Cir. 2004) ("Bankruptcy Court jurisdiction potentially extends to four types of title 11 matters, pending referral from the district court: '(1) cases under Title 11, (2) proceedings arising under Title 11, (3) proceedings arising in a case under Title 11, and (4) proceedings related to a case under Title 11.'" (internal citations omitted)).

First, the Court may enter a dispositive order determining whether this proceeding is core or non-core.

The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

28 U.S.C. § 157(b)(3) (West 2007). See also *Blackburn v. Blue Cross & Blue Shield of Northern Ohio (In re GF Corporation)*, 127 B.R. 384, 385 (Bankr. N.D. Ohio 1991).

Core proceedings "either invoke[] a substantive right created by federal bankruptcy law or . . . could not exist outside of the bankruptcy." *Browning v. Levy*, 283 F.3d 761, 773 (6th Cir. 2002) (internal citation omitted) (alterations in original). Section 157(b)(2) provides a non-exclusive list of core proceedings. The pertinent examples include "(A) matters concerning the administration of the estate; . . . (H) proceedings to determine, avoid, or recover fraudulent conveyances; . . .

[and] (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship. . . ." 28 U.S.C. § 157(b)(2) (West 2007).

Trustee's two central claims (Counts II and III - Trustee's fraudulent transfer claims) are core proceedings both under 28 U.S.C. § 157(b)(2)(H), and because these causes of action invoke substantive rights created by 11 U.S.C. § 550(a). "Because the Bankruptcy Code creates and defines the parameters of the § 550(a) right to recover, a § 550(a) cause of action is a proceeding 'arising under' Title 11 and thus is a core proceeding." *Bliss Technologies, Inc. v. HMI Industries, Inc.* (*In re: Bliss Technologies, Inc.*), 307 B.R. 598, 607 (Bankr. E.D. Mich. 2004). See also *Michigan Employment Security Comm'n v. Wolverine Radio Co.* (*In re Wolverine Radio Co.*), 930 F.2d 1132, 1144 (6th Cir. 1991) ("The phrase 'arising under title 11' describes those proceedings that involve a cause of action created or determined by a statutory provision of title 11" (citing 1 COLLIER ON BANKRUPTCY ¶ 3.01[1][c][iii])).

This court has jurisdiction over Trustee's remaining claims under 28 U.S.C. § 157(c)(1). "A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11."⁸ 11 U.S.C. § 157(c)(1) (West 2007). Counts IV, VI, VII, and X are not core proceedings, but are "related to" the bankruptcy case because their outcomes could increase the size of the bankruptcy estate. See *Browning v. Levy*,

⁸Section 157(c)(1) concludes: "In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing *de novo* those matters to which any party has timely and specifically objected."

283 F.3d at 773 (“[A] claim is ‘related to’ the bankruptcy proceeding if it would have affected the debtor’s rights or liabilities.”); and *Sanders Confectionary Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 482 (6th Cir. 1992) (“A matter is related to a bankruptcy case ‘if the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.’”) (internal citation omitted).

B. Ancillary Jurisdiction

Lamson’s claims are properly before this Court as ancillary claims to Trustee’s claims.

In determining whether there is ancillary jurisdiction over the claims of [Plaintiffs], “the proper focus in determining the jurisdictional issue is on the district court because bankruptcy court is a unit of the district court. 28 U.S.C. § 151.” (citation omitted). Federal courts have ancillary jurisdiction to hear non-federal claims in order to effectively resolve an entire, logically entwined lawsuit. See, e.g., *Owen Equipment & Erection Company v. Kroger*, 437 U.S. 365, 377 (1978). . . . *The Bankruptcy Court may hear claims over which there is ancillary jurisdiction where, as here, they are referred by the District Court.*

Petrolia Corporation v. Elam (In re Petrolia Corporation), 79 B.R. 686, 689 & 692 (Bankr. E.D. Mich 1987) (emphasis in original). A court has ancillary jurisdiction where all plaintiffs’ claims “derive from a common nucleus of operative fact” and “could be permissively joined under Rule 20 of the Federal Rules of Civil Procedure, which is designed to permit the resolution of all related disputes in one action.” *Id.* at 690.

As with the *Petrolia* claims, all claims here arise from a common nucleus of operative fact⁹ and could be joined under FED.

⁹As detailed in Memorandum Opinion Denying Motion to Dismiss (Case # 05-43771, Doc. # 62, at 2-5), incorporated by reference in this Order. See p. 3 *supra*.

R. CIVIL P. 20. Furthermore, ancillary jurisdiction's "justification lies in considerations of judicial economy, convenience and fairness to litigants" *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). This Court finds that judicial economy demands that both plaintiffs' claims be heard together as expeditiously as possible. *See generally, Petrolia*, 79 B.R. at 694. As detailed above, Lamson originally filed this case in state court against Debtor, Munding, and Peters, who removed it to this Court.¹⁰ It would be inefficient, inconvenient, and unfair to now require Lamson to bring a new case in state court. Exercising ancillary jurisdiction will also avoid subjecting Defendants to multiple litigations in state and federal forums. Accordingly, this Court finds that it has ancillary jurisdiction to hear these claims, and concludes that it is appropriate to exercise ancillary jurisdiction in this context.

C. Right to a Jury Trial

The Seventh Amendment to the United States Constitution preserves the right of trial by jury "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars" The United States Supreme Court has "consistently interpreted the phrase 'Suits at common law' to refer to 'suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized and equitable remedies were administered.'" *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989) (quoting *Parsons v. Bedford*, 3 Pet. 433, 447 (1830)) (emphasis in original).

¹⁰Lamson filed a claim against YSD for the amount of \$3,782,263.28, based on the same facts alleged in the Complaint. (Case # 05-43771, Claim # 48, amending Claim # 44).

There are three factors in determining if a litigant is entitled to a jury trial. *Keck, Mahin & Cate v. Bowytz (In re Keck, Mahin & Cate)*, 2001 U.S. Dist. LEXIS 3409, *3 (N.D. Ill. 2001); *Granfinanciera*, 492 U.S. at 42. These factors are: (i) whether the action could have been brought in the courts of England prior to the merger of the courts of law and equity; (ii) whether the remedy sought is legal or equitable; and (iii) whether the cause of action involves a matter of private or public right. *Id.* A right is public only "where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights . . . [or where Congress] devise[s] novel causes of action involving public rights . . . [and] assigns their adjudication to tribunals without statutory authority to employ juries as factfinders." *Granfinanciera*, 492 U.S. at 51.

In the instant case, the causes of action are all legal actions under contemporary jurisprudence, even if some have historical roots in equity. As such, all defendants have a right to a jury trial.

None of the claims involve public rights. With the exception of Claims II and III, all of the other claims are based on state law causes of action. Although Claims II and III, for fraudulent transfer, arise from the Bankruptcy Code as discussed above, the Supreme Court held that "a person who has not submitted a claim against a bankruptcy estate has a right to a jury trial when sued by the trustee in bankruptcy to recover an allegedly fraudulent money transfer . . . notwithstanding Congress' designation of fraudulent conveyance actions as 'core proceedings.'" *Granfinanciera*, 492 U.S. at 36. Because they have not submitted claims in this case, Defendants named in Counts II

and III have a right to a jury trial.

Count I, Lamson's breach of contract claim against Munding and Peters based on alter ego is a legal action requesting a legal remedy. An action "to collect amounts allegedly due under a contract . . . [is] traditionally legal in nature. Even if . . . the issues of alter-ego and fiduciary duty are integral or even overriding components of [the] Complaint, the legal nature of the breach of contract claim is not diminished." *Luper v. Banner Industries, Inc. (In re Lee Way Holding Company)*, 118 B.R. 544, 552 (Bankr. S.D. Ohio 1990) (citing *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 473 (1962)).

Count IV, Trustee's claim for breach of fiduciary duty, is also subject to a jury trial.

[A]n action for breach of fiduciary duty is an historically equitable action. Subsequent case law, however, has held that where a fiduciary breach arises out of acts, which, by themselves, permit a direct suit at law, then the case is legal in nature and subject to a jury trial. The Court also finds that the Trustee seeks monetary damages, a legal remedy, and under the second prong of the *Granfinanciera* test, a legal remedy brings with it a jury trial.

In re Lee Way Holding Company, 118 B.R. at 549. See also *Gertz v. Twin City Fire Insurance Company (In re Infotopia, Inc.)*, 2007 U.S. Dist. LEXIS 74087, *7 (N.D. Ohio 2007) ("Plaintiff seeks money damages from [defendants for breach of fiduciary duty], rendering th[e] matter an action at law not equity.") *Official Committee of Unsecured Creditors of Air Enterprises, Inc. v. Gaffney (In re Air Enterprises, Inc.)*, 2007 U.S. Dist. LEXIS 3418, *6 (N.D. Ohio 2007) ("Plaintiff seeks money damages from the defendants [for breach of fiduciary duty], rendering the matter an action at law not equity."); and *Lohmeier v. Himmelspach (In re Lohmeier)*, 303 B.R. 335, 338 (Bankr. E.D. Mich. 2004) (Noting "the

maxim that equitable jurisdiction does not apply where there is an adequate remedy at law[.]”).

Counts V and VI are both unjust enrichment claims. “A person who has been unjustly enriched at the expense of another is required to make restitution to the other.” RESTATEMENT OF RESTITUTION § 1. Courts distinguish between claims that are essentially ‘compensatory,’ and thus legal in nature, and equitable claims for ‘disgorgement,’ which are generally brought by a government agency or private party on behalf of a larger class.

Remedies known as “restitution” were available in courts of law and equity alike before their merger, and terms such as “restitution” and “unjust enrichment” have slowly changed from distinctive forms of action to measures of damages available in actions of all sorts. . . . The characterization of [disgorgement] actions as “equitable” does not control when as here the plaintiff seeks money for its own coffers.

First National Bank of Waukesha v. Warren, 796 F.2d 999, 1000 (7th Cir. 1986) (internal citation omitted). See also *Burns Philip Food, Inc. v. Cavalea Continental Freight, Inc.*, 135 F.3d 526, 528 (7th Cir. 1998) (Unjust enrichment claim for restitution is an “action at law” rather than constructive trust.); *Oshana v. The Coca-Cola Company*, 2005 U.S. Dist. LEXIS 14184, *36-39 (N.D. Ill. 2005) (Distinguishing between legal claims of restitution for unjust enrichment and the equitable claim of disgorgement); *K&R Express Sys., Inc. v. Grochocinski (In re K&R Express Systems, Inc.)*, 2007 U.S. Dist. LEXIS 62878, *11 (N.D. Ill. 2007) (Defendants entitled to a jury trial on claim of unjust enrichment where the Trustee sought money damages.); and *Dastgheib v. Genentech, Inc.*, 457 F.Supp. 2d 536, 543-544 (E.D. Pa. 2006) (“‘Restitution claims for money . . . are usually claims at law.’” (quoting DAN B. DOBBS, LAW OF REMEDIES: DAMAGES - EQUITY - RESTITUTION, 370 (1993))).

Here, both Plaintiffs' unjust enrichment claims are actions at law, and the Defendants are entitled to a jury trial. While Counts V and VI are self-styled as unjust enrichment claims, Lamson seeks restitution of the value of "benefits [Defendants] received from or due to Lamson" (Amended Claim ¶ 80), and the Trustee requests \$5.7 million in damages, the exact amount claimed in each of its other claims.

Count VII, for unlawful dividends, is a legal action, using the same analysis applicable to Count IV, above. Courts that have considered simultaneous claims of breach of fiduciary duty and unlawful dividends treat both claims together. See, e.g., *Pereira v. Farace*, 413 F.3d 330, 338 & 341 (2nd Cir. 2005) (Claim for "payment of dividends while [Defendant's] capital was impaired . . . is analogous to a breach of fiduciary duty claim," which, under the second prong of *Granfinanciera*, is a "claim for compensatory damages - a legal claim."); *Mirant Corporation v. The Southern Co.*, 337 B.R. 107, 121 (N.D. Texas 2006) (Defendant entitled to jury trial on illegal dividend claim.); and *Magers v. Bonds (In re Bonds Distributing Co., Inc.)*, 2000 Bankr. LEXIS 2011, *23 (Bankr. M.D. N.C. 2000) (A director's personal liability "for amounts lost by the corporation as a result of excessive payments made to others . . . is more in the nature of a legal remedy for the recovery of damages than the equitable remedy of restitution.").

Count VIII, for intentional interference with contract, and Count IX, for professional negligence, are both tort claims. As such, they are actions at law, not in equity. "[A] court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort or

for money had and received." *Granfinanciera*, 492 U.S. at 47-48. Defendants named in Counts VIII and IX have a right to trial by jury.

Finally, Count X, Trustee's claim against Dennison, Messenger, and Packer Thomas for aiding and abetting the fraudulent transfers that underlie all of the other Trustee's counts, is likewise a legal action, under the same analysis set forth above.

IV. CONCLUSION

Defendants are entitled to a jury trial on all Counts. 28 U.S.C. § 157(e) provides that "[i]f the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all parties." 28 U.S.C. § 157(e) (West 2007). See also FED. R. BANKR. P. 9015. The bankruptcy courts in the Northern District of Ohio are specially designated to exercise such jurisdiction by General Order No. 84 dated July 16, 1984, issued by former Chief Judge Frank Battisti for the United States District Court, Northern District of Ohio. This Order refers to the Bankruptcy Judges of the District "any and all cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11." Because the instant action is a proceeding that is related to a case under Title 11, this Court has jurisdiction thereof.

Because all Defendants have already stated that they do not consent to the Bankruptcy Court conducting a jury trial (Doc. # 153 at 9; Doc. # 154 at 6-7), this Court recommends that the District Court withdraw the reference of this Adversary

Proceeding. As an alternative, in order to save the resources of the District Court and to utilize this Court's already existing familiarity with the main bankruptcy case, the District Court could withdraw the reference of the Adversary Proceeding for the purposes of conducting the jury trial, but direct this Court to handle all discovery, dispositive motions and other matters leading up to jury trial.

IT IS SO ORDERED.

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